in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

Case No. 78-1003

DONALD YOFFE,

Petitioner,

versus

KELLER INDUSTRIES, INC., a corporation and HENRY A. KELLER and NORMAN S. EDELCUP, Individuals,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEVINE, RECKSON, REED & GEIGER, P.A.
3501 Biscayne Boulevard
Miami, Florida 33137

MUDGE, ROSE, GUTHRIE & ALEXANDER
20 Broad Street
New York, New York 10005

Counsel for Respondents

INDEX

TABLE OF AUTHORITIES

OTHER AUTHORITIES

in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

Case No. 78-1003

DONALD YOFFE,

Petitioner,

versus

KELLER INDUSTRIES, INC., a corporation and HENRY A. KELLER and NORMAN S. EDELCUP, Individuals,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondents, Keller Industries, Inc., Henry A. Keller, and Norman Edelcup respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 580 F.2d 126, rehearing denied 582 F.2d 982.

OPINION BELOW

Two orders were entered by the United States District Court for the Southern District of Florida which were not printed in the Appendix to the Petition. They appear in the Appendix to this Brief in Opposition at pages App. 1 to App. 8.

QUESTIONS PRESENTED

Respondents believe that the Petition misstates question number 2 and that question number 2 should be stated as follows:

> Is the Court of Appeals required to give full appellate review to an award of attorney's fees entered as a condition to a voluntary dismissal without prejudice, when it appears upon preliminary review that the amount of the award was not unreasonable and the District Court did not abuse its discretion in granting fees or the amount thereof?

STATUTORY PROVISIONS INVOLVED

Florida Rules of Civil Procedure Rule 1.420: Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof.

(1) By Parties. Except in actions wherein property has been seized or is in the custody of the court, an action may be dismissed by plaintiff without order of court (i) by serving or during trial, by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if such motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim. If a lis pendens has been filed in the action, a notice or stipulation of dismissal under this paragraph shall be recorded and cancels the lis pendens without the necessity of an order of court.

(2) By order of Court; If Counterclaim. Except as provided in the subdivision (a)(1) of this rule, an action shall not be dismissed at a party's instance except on order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been served by a defendant prior to the service upon him of the plaintiff's notice of dismissal, the action shall not be dismissed against defendant's objections unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

REASONS WHY THE WRIT SHOULD BE DENIED

I. This Court's decision in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 1975, 421 U.S. 420, 95 S.Ct. 1612, 44 L.Ed.2d. 141, does not preclude an award of attorneys' fees as a condition to the grant of plaintiff's motion for a voluntary dismissal without prejudice under Rule 41 (a) (2). *Alyeska* does not apply since:

1. The attorneys' fees were not awarded to a prevailing party but imposed as a condition of a voluntary dismissal without prejudice.
2. The attorneys' fees were not taxed as costs under 28 USC §1920.
3. The attorneys' fees were not awarded to a "private attorney general".

Petitioner claims that the decision presents an important question of law because it will have a "substantial chilling" effect on a plaintiff's ability to take a voluntary dismissal. In this period of great strain on the federal judicial system involving substantial delay in the trial of important litigation, no plaintiff should have the right to dismiss on the eve of trial. The efficient administration of justice requires that the privilege of a voluntary dismissal without prejudice after a pretrial conference be chilled, that such privilege only be exercised for the most compelling of reasons and subject to the control of the trial courts.

Chief Justice Burger had the following comments in June, 1976.

> Increasingly in the past twenty years, however, responsible lawyers have pointed to abuse of the pretrial processes in civil cases. The complaint is that misuse of pretrial procedures means that "the case must be tried twice." The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands. *The Direction of the Administration of Justice*, 62 American Bar Association Journal, 727, 729, June, 1976.

Petitioner suggests that the Erie doctrine requires the application of Florida rules rather than the provisions of Rule 41 (a) (2) of the Rules of Civil Procedure. Under the Florida Rules of Civil Procedure at paragraph 1.420(a) a plaintiff may dismiss an action without order of the court at any time before a hearing on summary judgment, or submission of the case to a jury or to a court for decision. Petitioner's reliance on *Campbell v. Maze* for the proposition that a Florida state judge cannot award attorneys' fees on a motion for voluntary dismissal, is misplaced. The *Campbell* case held that attorneys' fees cannot be awarded as costs pursuant to Rule 1.420(a) (1). The *Campbell* case did not deal with subsection 2 of Rule 1.420(a). Florida Rule 1.420(a) (2) is identical in terms to the Federal Rule 42(a) (2) which provides

> "except as provided in subdivision (a) (1) of this rule, an action shall not be dismissed at a party's instance except on order of the court and upon such terms and conditions as the court deems proper."

The Florida Courts have consistently held that federal cases interpreting federal rules of procedure identical to a

Florida rule will be followed. See e.g. *Zuberbuhler v. Division of Administration*, Fla. App. 334 So.2d 1304, 1306:

> [2] Rule 1.280(b)(3) is a verbatim adoption of Federal Rule of Civil Procedure 26(b)(4). Generally, it must be assumed that in adopting a rule identical to a Federal rule that our Supreme Court intended to achieve the same results that would inure under the Federal rule. *Edgewater Drugs, Inc. v. Jax Drugs, Inc.*, 138 So.2d 525 (Fla. 1st DCA 1962). Recently this court, speaking through Judge McNulty, said: . . . it's well known that our Rules of Civil Procedure are patterned very closely after the Federal rules, and it has been the practice of the Florida courts closely to examine and analyze the Federal decisions and commentaries under the Federal rules in interpreting ours. *Jones v. Seaboard Coast Line RR Co.*, 297 So.2d 861, 863 (Fla. 2d DCA 1974) (footnotes omitted).

Campbell v. Maze, supra which held that attorneys' fees cannot be assessed as costs in a situation where a voluntary dismissal without prejudice may be taken as a matter of right under subpart (1) of the Rule is not authority for the proportion that attorneys' fees cannot be awarded where an action may not be dismissed "except on order of the court and upon such terms and conditions as the court deems proper." The Florida Courts would follow the rule in the Fifth Circuit that an award of attorneys' fees under such circumstances is a matter within the discretion of the trial court. *LeCompte v. Mr. Chip, Inc.*, 5 Cir., 1976, 528 F.2d 601.

Petitioner's argument that 28 USC §2072 precludes any award of attorneys' fees flies in the face of express

provisions of the Rules of Civil Procedure, adopted by this Court. See e.g. Rule 37 (a)(4):

> (4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees . . .
>
> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees . . .
>
> If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

II. The Court of Appeals is not required to give full appellate review to an award of attorney's fees entered as a condition to a voluntary dismissal without prejudice, when it appears upon preliminary review that the amount of the award was not unreasonable and the District Court did not abuse its discretion in granting fees or the amount thereof

The holding of the Fifth Circuit was stated in clear and unmistakable terms.

> We hold that, under a review limited to determining whether the plaintiff has suffered legal harm, the District Court acted within its discretion in awarding the amount adjudged as the defendant's reasonable attorneys' fees and costs.

The Petitioner's contention that this holding amounts to a denial of appellate review fails to meet the real issue: How much review is an appellant appealing the amount of attorneys' fees imposed as a condition of a voluntary dismissal without prejudice entitled to have? The Fifth Circuit found Yoffe had standing and found that the judgment was subject to review, contrary to the suggestion of the Petitioner. But the Fifth Circuit limited the scope of the review to the question of whether the action of the trial court was "within its discretion". In holding that the trial court properly exercised its discretion, the Court of Appeals necessarily had to review each of the plaintiff's contentions. See Note 12 to the decision of the Court of Appeals. In so holding the Fifth Circuit followed the only other Circuit which has apparently dealt with the issue, the Sixth Circuit in *Scholl v. Felmont Oil Corporation*, 327 F.2d 697 (6th Cir. 1964).

The issue presented is hardly an issue of substantial concern. Only a handful of cases in the past 20 years have dealt with Rule 41(a)(2). On the issue of the amount of the fees only questions of evidence and factual findings are involved.

The Fifth Circuit plainly stated at the conclusion of its opinion that a review had been made of the terms and

conditions of Yoffe's motion for voluntary dismissal without prejudice and found them not clearly unreasonable. The Fifth Circuit stated "we will examine each case to ensure that terms and conditions accompanying the grant of a plaintiff's Rule 41(a)(2) motion are not so outrageous as to demand a full appellate review."

To expedite the enormous increasing case load on the Fifth Circuit (a matter of common knowledge which requires no citation of authority), the Fifth Circuit has adopted rules of procedure which have modified the former practice of full review and oral argument. See Rule 18 of the Fifth Circuit. The summary calendar and the denial of oral argument are methods which have been utilized to expedite the handling of the enormous work load of the Court. In essence the review afforded the appellant by the Fifth Circuit was summary review and within the appellate court's discretion.

CONCLUSION

The petition presents no conflict with prior decisions of this Court, presents no issues of federal law worthy of review by this Court and raises questions of importance only to the litigants. The petition should be denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of January 1979, three copies of the Respondents Brief in Opposition were mailed, postage prepaid to Green & Cooper, P.A., Suite 1002, Concord Bldg., 66 West Flagler Street, Miami, Fla. 33130 and Lipkin, Stutzman, Marshall & Bohorad, American Bank Bldg., Pottsville, Pennsylvania 17901, Counsel for Petitioners. I further certify that all parties required to be served have been served.

RICHARD E. RECKSON

Levine, Reckson, Reed & Geiger, P.A.
3501 Biscayne Blvd.
Miami, Florida 33137

/s/ Richard E. Reckson
Richard E. Reckson

APPENDIX

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 74-628-Civ-JLK

DONALD YOFFE,

Plaintiff,

vs.

KELLER INDUSTRIES, INC., a corporation, and HENRY A. KELLER and NORMAN S. EDELCUP, Individuals,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE AND REQUIRING PAYMENT OF REASONABLE COSTS, EXPENSES AND ATTORNEYS' FEES TO DEFENDANTS

This cause came on for hearing upon the plaintiffs' motion for continuance of trial or alternatively, voluntary dismissal. The court announced its denial of the motion for continuance at the outset of the hearing and counsel were heard upon the issue of whether the dismissal would be with prejudice or not.

The complaint was filed May 13, 1974, and both sides engaged in extensive pre-trial discovery and preparation for trial. Indeed, counsel for the plaintiff candidly admitted that the primary purpose for the instant litigation was to obtain this precise discovery since plaintiff had been unable to effect discovery from these defendants in companion litigation pending in the state courts of Pennsylvania. To the extent that discovery of defendant's case for the use in the Pennsylvania litigation was their objective, plaintiff was completely successful in this case.

The claims by plaintiff for punitive damages against individual defendants were dismissed. The appeal from the order of dismissal was denied and motion to dismiss the appeal granted. On October 17, 1974 at the pre-trial conference, this court denied a motion by plaintiff for leave to proceed with additional discovery upon the basis that the time to complete discovery had previously been extended by the court to accommodate out-of-state counsel. The case was set for trial on November 4, 1974. Plaintiff, on October 31, 1974 moved for a continuance due to unexpected illness of one of plaintiff's trial counsel. The continuance was granted with notice to plaintiff's remaining counsel to advise the court as to a specific date when plaintiff's trial counsel could proceed to trial or in the event of his protracted unavailability, to arrange for counsel to be substituted in order that the trial could proceed. Thereafter, this case was scheduled for trial commencing January 6, 1975.

On December 17, 1974 plaintiff filed this motion for voluntary dismissal without prejudice as to defendant Keller Industries, Inc. and for a stay of proceedings with respect to the individual defendants pending a trial in the Court of Common Pleas of Schuylkill County, Pennsyl-

vania, or, in the alternative, for a voluntary dismissal without prejudice as to defendants. Counsel suggested in oral argument that the action in Pennsylvania involves many of the same issues as the case at bar and is now about to get to trial after pending for 3½ years. They argue that the depositions taken in this case will be useful to plaintiff in the Pennsylvania case and that no harm will result in awaiting the outcome of the state case.

After careful consideration of the pleadings in this case and upon review of the record the court must deny the request for another continuance of the trial. The continuance of November 4, 1974 was described as final and no extraordinary circumstances has been presented by plaintiff to alter that decision.

The court also denies plaintiff's motion to the extent that it requests as alternative relief the stay of this trial as it relates to individual defendants pending a determination as to the legal issues pertaining to the corporation in the Pennsylvania case. The individual defendants are not parties to the Pennsylvania case and further delay with respect to their rights would impose an unfair and serious burden without any prospect for effective determination in the Pennsylvania case.

Although both the corporate defendant and the individual defendants have strongly objected to plaintiff's motion for voluntary dismissal without prejudice, the court has concluded that in justice and fairness the dismissal should be without prejudice.

Pursuant to Rule 41(a)(2), however, the court is authorized to impose, upon the granting of such a motion, conditions which protect all parties. The court notes that from the start of this action all defendants have defended

vigorously and conducted extensive pre-trial discovery and preparations for their defense of the serious allegations of the complaint. The defendants have consistently pressed for a speedy determination of the issues here raised.

The plaintiff has used the court to achieve his stated purpose of completing discovery for his Pennsylvania case and now, on the eve of trial, voluntarily dismiss after defendants have incurred substantial expense in defending this litigation. This cannot be condoned. The plaintiff shall pay all costs and expenses, including reasonable attorneys' fees incurred by defendants in this case. *American Cyanamid Company v. McGhee,* 5th Cir. 1963, 317 F.2d 295. It is therefore

ORDERED and ADJUDGED that the plaintiff's motion for voluntary dismissal without prejudice be and the same is hereby granted. A hearing will be held for the purpose of considering and fixing defendants' costs, expenses and attorneys' fees on Tuesday, March 4, 1975, in the central courtroom of the U.S. courthouse, Miami, Florida.

DONE and ORDERED in chambers at Miami, Florida, this 28th day of January 1975.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Richard E. Reckson, Esq.
Irwin L. Langbein, Esq.
Louis Loss, Esq.
Aaron Podhurst, Esq.
Lipkin, Stutzman, Marshall & Bohorad

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 74-628-Civ-JLK

DONALD YOFFE,
Plaintiff,

vs.

KELLER INDUSTRIES, INC., a corporation, and HENRY A. KELLER and NORMAN S. EDELCUP, Individuals,
Defendants.

ORDER AND JUDGMENT

On January 28, 1975, this court entered an order granting plaintiff's motion for voluntary dismissal without prejudice on the condition that plaintiff pay all costs and expenses, including reasonable attorneys' fees incurred by defendants in this case. Pursuant to the order, a hearing to consider and fix defendants' costs, expenses and attorneys' fees was held on June 4, 1975 and continued on October 28, 1975.

During the course of the hearing, defendants' counsel gave testimony and were cross-examined by plaintiff concerning the services which were performed by them, their accountants and their respective law firms, the costs and expenses which were incurred by them and the fees

which were charged by them in connection with the defense of this action. In further support of the claims for costs, expenses and attorneys' fees, defendants introduced extensive documentary evidence including statements and bills and certain additional items such as time-logs and work reports. Defendants also called two expert witnesses who testified that the attorneys' fees charged by the respective counsel were fair and reasonable. Defendants called a corporate officer of defendant Keller Industries, Inc. who testified that, pursuant to an indemnification agreement which covered the two individual defendants who are officers of the corporate defendant, all of the expenses of those individual defendants were required to be borne by defendant Keller Industries, Inc. and that all costs, expenses and attorneys' fees found to be owned by plaintiff all were owed to defendant Keller Industries, Inc.

During the course of the two sessions of the hearing, plaintiff had the opportunity to cross-examine defendants' counsel and witnesses to offer expert testimony of its own and to present rebuttal evidence but plaintiff failed to present any evidence that the costs, expenses and attorneys' fees represented to the court as having been incurred by defendants were not so incurred. Plaintiff offered no proof that the attorneys' fees charged defendant Keller Industries, Inc. for the services performed by defendants' counsel were not reasonable. Plaintiff offered no expert testimony to counter the testimony of defendants' expert witnesses that the amount of the attorneys' fees were fair and reasonable.

At the conclusion of the hearing, this court gave the parties the opportunity to submit memoranda in lieu of closing oral argument. Plaintiff's concluding arguments for the most part concerned defendants' inability to meet

their burden of proving entitlement to any award of costs, expenses and reasonable attorneys' fees. The Order of this Court of January 28, 1975 has decided the issue of defendants' entitlement to costs, expenses and attorneys' fees. Plaintiff, by order of this court, is required to pay costs and expenses, including reasonable attorneys' fees incurred by defendants in this case. The purpose of the hearing was merely to consider and fix the amount of those costs, expenses and attorneys' fees which had, in principle, already been granted to defendants. To the extent plaintiff's arguments concerned defendants' entitlement to costs, expenses, and attorneys' fees, it is moot.

With respect to the issue of whether the attorneys' fees incurred by defendant Keller Industries, Inc. were reasonable, plaintiff offered no evidence that they were not reasonable and, similarly, offered no evidence of what would be considered reasonable. This Court, unfortunately for plaintiff, had the benefit of expert testimony only on behalf of defendants.

After careful consideration of the memoranda submitted by the parties and the record of the hearing and upon review of exhibits A through J submitted by defendants in support of their claim in the amount of $134,789.22 for costs, expenses and reasonable attorneys' fees, it is, therefore,

ORDERED AND ADJUDGED that Plaintiff shall pay defendant Keller Industries, Inc., the amount of $44,523.20 as costs, expenses and reasonable attorneys' fees pursuant to the Order of this Court dated January 28, 1975. Plaintiff shall not be required to pay defendants' costs, expenses and attorneys' fees in connection with services performed in preparation for the hearing to con-

sider and fix the costs, expenses and attorneys' fees. The total amount of the judgment for defendant Keller Industries, Inc. was determined by this Court by adding costs submitted by defendant and then subtracting the statement of defendants' counsel for all amounts charged after January, 1975. The Court further is only allowing a portion of the fees of Mudge, Rose, Guthrie & Alexander. The resulting allocation of defendant's approved costs is as follows:

Mudge, Rose Guthrie & Alexander	$20,000.00
Podhurst, Orseck & Parks, P.A.	10,983.23
Levine, Helman & Reckson, P.A.	11,531.20
Ernst & Ernst	690.00
Berliner, Maloney, Gimer & Muir	1,318.77
	$44,523.20

DONE AND ORDERED in Chambers at Miami, Florida, this 17 day of March, 1976.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT
JUDGE

Copies furnished to:
Irwin L. Langbein, Esquire
Podhurst, Orseck & Parks, P.A.
Levine, Helman & Reckson, P.A.
Mudge, Rose, Guthrie & Alexander